

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ERIC V.

Claimant,

vs.

VALLEY MOUNTAIN REGIONAL
CENTER,

Service Agency.

OAH No. 2005120611

DECISION

Administrative Law Judge Robert Walker, State of California, Office of Administrative Hearings, heard this matter in Modesto, California, on March 16, 2006.

Gary Westcott, Ph.D., represented Valley Mountain Regional Center.

Matthew E. Yeoman, Attorney at Law,¹ represented the claimant, Eric V.

SUMMARY AND ISSUES

Regional center determined that claimant is not eligible for regional center services, and claimant appealed the decision.

Is claimant eligible for regional center services? That is the ultimate issue.

Claimant contends that he is mentally retarded or comes within the, so called, fifth category of eligibility. One is eligible under the fifth category if he or she has a disabling condition that is closely related to mental retardation or if he or she has a disabling condition that requires treatment similar to that required for individuals with mental retardation.² The

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² The, so called, fifth category is found in Welfare and Institutions Code, section 4512, subdivision (a).

qualifying conditions are discrete. One can qualify for services if he or she has a disabling condition that is closely related to mental retardation. And one can qualify if he or she has a disabling condition that requires treatment similar to that required for individuals with mental retardation.

Regarding the issue of mental retardation, intermediate issues include the following:

1. Does claimant have significantly subaverage general intellectual functioning?
2. Does claimant have significant limitations in adaptive functioning?
3. Did the onset of claimant's condition occur before age 18 years?³

Regarding the fifth category, intermediate issues include the following:

1. Does claimant have a disabling condition?
2. Did claimant's disability originate before he attained age 18?
3. Can claimant's disability be expected to continue indefinitely?
4. Does claimant's disability constitute a substantial disability for him?
5. Is claimant's disabling condition one that is closely related to mental retardation?
6. Is claimant's disabling condition one that requires treatment similar to that required for individuals with mental retardation?
7. Is claimant's condition solely physical in nature?
8. Is claimant's condition solely a psychiatric disorder?
9. Is claimant's condition solely a learning disability?⁴

FACTUAL FINDINGS

³ These three issues are derived from Welfare and Institutions Code section 4512, subdivision (a) and the American Psychiatric Association's Diagnostic and Statistical Manual, fourth edition, Text Revision, p. 41.

⁴ The first seven of these issues are derived from Welfare and Institutions Code, section 4512, subdivision (a). Issues numbers eight and nine are derived from the California Code of Regulations, title 17, section 54000, subdivision (c).

EVIDENCE REGARDING CLAIMANT'S CONDITION

1. Claimant, Eric V., was born on July 14, 1987. He is 19 years old.
2. On November 13, 2002, Edward R. Busch, MS, observed claimant, administered certain tests, reviewed earlier test results, and wrote a psycho-educational evaluation for the Modesto City Schools. Mr. Busch reported that, on tests given in 2000, claimant "displayed a composition IQ of 70 on the Kaufman Brief Intelligence Test and a non-verbal IQ of 74 on the TONI 2."
3. Mr. Busch administered the Wechsler Intelligence Scale for Children – 3rd Edition (WISC III),– 3rd Edition (TONI III), and the Woodcock-Johnson Tests of Achievement – 3rd Edition (WJ III). On the WISC III, claimant scored a verbal IQ of 52 and a performance IQ of 82, which produced a full scale IQ of 65. Mr. Busch wrote that, "these results indicate that Eric is functioning in the lower extreme range of intellectual ability with an estimated FSIQ score between 59 to 71."
4. Mr. Busch wrote that claimant, "appeared to have below average intellect, and his judgment appeared poor on test questions that require comprehending how to engage real world situations." And in discussing how claimant functions, Mr. Busch wrote, "his present level of functioning is indicative of students who are mild mentally retarded."
5. In November of 2004, criminal charges were pending against claimant for lewd and lascivious acts with a child and for annoying or molesting a child. The Superior Court of Stanislaus County appointed Gary W. Zimmerman, Ph.D., to assess whether claimant was mentally competent to stand trial. As part of Dr. Zimmerman's assessment, he administered the Wechsler Adult Intelligence Scale, third edition (WAIS III). Claimant obtained a verbal IQ score of 66 and a performance score of 70, which produced a full scale score of 65. Dr. Zimmerman observed that "this would place . . . [claimant] at the upper end of the Mild Mental Retardation classification of mental abilities as defined by the American Psychiatric Association. Auditory memory was particularly weak, followed by math skills and visual reasoning. There were no areas of particular strength."
6. In June of 2005 the court, pursuant to Penal Code section 1369, appointed the director of the regional center to determine whether claimant is developmentally disabled within the terms of the Lanterman Act,⁵ and, if so, whether he was mentally competent to stand trial. Kyle Van Gaasbeek, Psy.D., is a clinical psychologist with the regional center. He met with claimant and both of claimant's parents on July 22, 2005. Dr. Van Gaasbeek attempted to interview claimant and to administer certain tests – including a standard IQ test and a standard assessment of claimant's adaptive functioning. Claimant refused to cooperate, and Dr. Van Gaasbeek concluded that he could not make a valid assessment as to whether claimant was developmentally disabled. On August 24, 2005, Dr. Van Gaasbeek met with

⁵ The Lanterman Developmental Disabilities Services Act begins at Welfare and Institutions Code, section 4400.

claimant and claimant's mother. Again claimant was uncooperative, and again Dr. Van Gaasbeek concluded that he could not make a valid assessment.

7. By a letter dated August 26, 2005, Dr. Van Gaasbeek notified the court that the regional center was unable to make a determination that claimant was mentally retarded or otherwise developmentally disabled.

8. After Dr. Van Gaasbeek wrote that letter, he received a copy of Mr. Busch's November 13, 2002, psycho-educational evaluation. Based on Mr. Busch's evaluation, Dr. Van Gaasbeek concluded that claimant is not mentally retarded and not eligible for regional center services under the fifth category of eligibility.

9. A regional center assessment team concluded that claimant was not eligible for regional center services, and by a letter dated September 26, 2005, regional center notified claimant's parents of that decision.

10. Claimant's attorney filed a fair hearing request dated December 7, 2005, to appeal regional center's decision, and the hearing in this matter followed.

11. At the hearing, Gary Westcott, Ph.D., who represented the regional center, testified. He testified that claimant is not mentally retarded and that his condition is a classic learning disability.

12. At the hearing in this matter claimant's attorney offered no professional opinion that claimant is mentally retarded, that he has a disabling condition that is closely related to mental retardation, or that he has a disabling condition that requires treatment similar to that required for individuals with mental retardation.

WHAT IS MENTAL RETARDATION?

13. The American Psychiatric Association's Diagnostic and Statistical Manual, fourth edition, Text Revision, (DSM IV TR) identifies three criteria – one "essential" criterion and two other criteria – used in diagnosing mental retardation. The "essential" criterion is "significantly subaverage general intellectual functioning." A second criterion is that the subaverage general intellectual functioning must be "accompanied by significant limitations in adaptive functioning" And the third and final criterion is that "the onset must occur before age 18 years."⁶

⁶ DSM IV TR, p. 41.

GENERAL INTELLECTUAL FUNCTIONING

14. The DSM IV TR provides that:

General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children-Revised, Stanford-Binet, Kaufmann Assessment battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus it is possible to diagnose mental retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.⁷

15. The DSM IV TR also provides for distinguishing among levels of intellectual impairment depending on the degree of severity of a party's mental retardation. The levels are as follows:

Mild ...	IQ ... 50-55 to approximately 70
Moderate ...	IQ ... 35-49 to 50-55
Severe ...	IQ ... 20-25 to 35-40
Profound ...	IQ ... below 20 or 25 ⁸

16. According to the DSM IV TR, people with mild mental retardation:

typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their

⁷ *Id.* at p. 41 - 42.

⁸ *Id.* at p. 42

late teens, they can acquire academic skills up to approximately the sixth grade level.⁹

17. A person with an IQ between 71 and 84, if not mentally retarded, is considered to be of borderline intellectual functioning. The DSM IV TR provides:

Borderline Intellectual functioning . . . describes an IQ range that is higher than that for Mental Retardation (generally 71 – 84). As discussed earlier, an IQ score may involve a measurement error of approximately 5 points, depending on the testing instrument. Thus, it is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for Mental Retardation. Differentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information.¹⁰

CLAIMANT'S LEVEL OF COGNITIVE FUNCTIONING

18. What is the level of claimant's ability to acquire knowledge and make judgments? Does claimant's condition involve something that resembles the essential criterion for diagnosing mental retardation? That is, does it involve something that resembles significantly subaverage general intellectual functioning?

19. There is evidence that claimant has significantly subaverage general intellectual functioning. As noted above, Mr. Busch reported that, on tests given in 2000, claimant displayed a composition IQ of 70 on the Kaufman Brief Intelligence Test and a non-verbal IQ of 74 on the TONI 2. On the WISC III that Mr. Busch administered, claimant scored a verbal IQ of 52 and a performance IQ of 82, which produced a full scale IQ of 65. Mr. Busch wrote that, "these results indicate that Eric is functioning in the lower extreme range of intellectual ability with an estimated FSIQ score between 59 to 71." Mr. Busch observed that claimant, "appeared to have below average intellect, and his judgment appeared poor on test questions that require comprehending how to engage real world situations." And in discussing how claimant functions, Mr. Busch wrote, "his present level of functioning is indicative of students who are mild mentally retarded."

20. As noted above, the DSM IV TR provides that:

When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically

⁹ *Id.* at p. 43.

¹⁰ *Id.* at p. 48.

derived full scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.¹¹

21. There was significant scatter in claimant's subtest scores on the WISC III that Mr. Busch administered – a verbal IQ of 52 and a performance IQ of 82. Thus, the full scale IQ of 65 that Mr. Busch calculated may be misleading. Nevertheless, Mr. Busch's evaluation certainly indicates that claimant has significantly subaverage general intellectual functioning

22. Dr. Zimmerman's assessment is further evidence that claimant has significantly subaverage general intellectual functioning. On the WAIS III that Dr. Zimmerman administered, claimant obtained a verbal IQ score of 66 and a performance score of 70, which produced a full scale score of 65. Dr. Zimmerman observed that "this would place . . . [claimant] at the upper end of the Mild Mental Retardation classification of mental abilities as defined by the American Psychiatric Association."

ADAPTIVE FUNCTIONING

23. The DSM IV TR criterion regarding limitations in adaptive functioning concerns limitations "in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, work, leisure, health, and safety."¹²

Impairments in adaptive functioning rather than low IQ are usually the presenting symptoms in individuals with Mental Retardation. Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.¹³

¹¹ *Id.* at p. 41 - 42.

¹² *Id.* at p. 41.

¹³ *Id.* at p. 42.

24. The DSM IV TR recommends that one gather evidence regarding deficits in adaptive functioning from one or more reliable independent sources, e.g. teacher evaluation and educational, developmental, and medical history.

Several scales have also been designed to measure adaptive functioning or behavior (e.g. the Vineland Adaptive Behavior Scales and the American Association on Mental Retardation Adaptive Behavior Scale). These scales generally provide a clinical cutoff score that is a composite of performance in a number of adaptive skill domains.¹⁴

EXPERT OPINION REGARDING CLAIMANT'S ADAPTIVE FUNCTIONING

25. There is very little evidence concerning claimant's adaptive functioning.

26. Mr. Busch wrote that:

Behavioral information from past testing and current input provided by teachers indicate no emotional disturbance. However, he does not adapt well to social situations that one is exposed to in school and community. His daily living skills are a concern, and he has difficulty expressing his needs.

27. Both Mr. Busch and Dr. Zimmerman conclude that claimant has limitations in one of the skill areas identified in the DSM IV TR, that is, the communication skill area.

28. The record in this proceeding, unfortunately, is rather unsatisfactory regarding claimant's adaptive functioning. There is no evidence that the Vineland Adaptive Behavior Scale or any other standard measure of adaptive functioning has been completed.

29. On this record, it is impossible to find that claimant has significant limitations in adaptive functioning in at least two of the skill areas specified in the DSM IV TR.

DOES CLAIMANT HAVE A SUBSTANTIAL DISABILITY AND, IF SO, CAN IT BE EXPECTED TO CONTINUE?

30. The California Code of Regulations defines substantial handicap as follows:

Substantial handicap" means a condition which results in major impairment of cognitive and/or social functioning. Moreover, a substantial handicap represents a condition of sufficient impairment to require interdisciplinary planning and

¹⁴ *Ibid.*

coordination of special or generic services to assist the individual in achieving maximum potential.¹⁵

Since an individual's cognitive and/or social functioning are many-faceted, the existence of a major impairment shall be determined through an assessment which shall address aspects of functioning including, but not limited to: (1) Communication skills; (2) Learning; (3) Self-care; (4) Mobility; (5) Self-direction; (6) Capacity for independent living; [and] (7) Economic self-sufficiency.¹⁶

31. There is no evidence that a competent professional has expressed the opinion that claimant has a substantial disability that can be expected to continue.

DISABLING CONDITION THAT IS CLOSELY RELATED TO MENTAL RETARDATION

32. There is no evidence that a competent professional has expressed the opinion that claimant has a disabling condition that is closely related to mental retardation.

WHAT TREATMENT IS REQUIRED FOR INDIVIDUALS WITH MENTAL RETARDATION?

33. The parties offered little evidence on this point. The DSM IV TR, however, contains a modest amount of information concerning treatment. In discussing people with mild mental retardation, the DSM IV TR says:

During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.¹⁷

34. In discussing people with moderate mental retardation, the DSM IV TR says:

They profit from vocational training and, with moderate supervision, can attend to their personal care. They can also benefit from training in social and occupational skills They may learn to travel independently in familiar places In

¹⁵ Cal. Code Regs., tit. 17, § 54001, subd. (a).

¹⁶ *Id.* at subd. (b).

¹⁷ DSM IV TR, p. 43.

their adult years, the majority are able to perform unskilled or semiskilled work under supervision¹⁸

WHAT TREATMENT DOES CLAIMANT'S DISABLING CONDITION REQUIRE?

35. In Mr. Busch's evaluation, he concludes that "Eric continues to qualify [for special education services] under the specific category of learning disability." Mr. Busch recommends certain classes and programs. But there is no evidence that a competent professional has expressed the opinion that claimant requires treatment similar to that required for individuals with mental retardation.

LEGAL CONCLUSIONS

1. The Lanterman Act is an entitlement act. People who are eligible under it are entitled to services and supports.¹⁹

The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (citations) and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community (citations).²⁰

2. The act is a remedial statute and, as such, must be interpreted broadly.²¹

3. A developmental disability is a "disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual." The term includes mental retardation, cerebral palsy, epilepsy, autism, and what is commonly referred to as the "fifth category."²² The fifth category includes "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation."²³

¹⁸ *Ibid.*

¹⁹ *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.

²⁰ *Id.* at p. 388.

²¹ *California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.

²² Welf. & Inst. Code, § 4512, subd. (a).

²³ *Ibid.*

4. Thus, individuals whose IQ scores do not fall squarely within the range of mental retardation can be eligible under the fifth category.

5. The regulations implementing the act provide that conditions that are solely psychiatric in nature, solely learning disabilities, or solely physical disabilities are not considered to be developmental disabilities.²⁴

6. A substantial handicap is a "condition which results in a major impairment of cognitive and/or social functioning" which requires "interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential."²⁵ Whether an individual suffers from a substantial disability in cognitive or social functioning depends on his or her functioning in a number of areas, including: communication skills, learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency.²⁶ Cognitive functioning has to do with "the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience."²⁷

7. By reason of the matters set forth in Findings 13 and 23 through 28, it is determined that claimant failed to prove that he is mentally retarded.

8. By reason of the matters set forth in Findings 13 through 32, it is determined that claimant failed to prove that he has a disabling condition that is closely related to mental retardation.

9. By reason of the matters set forth in Findings 33 through 35, it is determined that claimant failed to prove that he requires treatment similar to that required for individuals with mental retardation.

10. By reason of the matters set forth in Findings 30 and 31, it is determined that claimant failed to prove that he has a disability that constitutes a substantial disability for him and can be expected to continue indefinitely.

11. It is determined that claimant failed to prove that he is eligible for regional center services.

²⁴ Cal. Code Regs., tit. 17, § 54000, subd. (c) (1), (2), & (3).

²⁵ *Id.* at § 54001, subd. (a).

²⁶ *Id.* at § 54001, subd. (b).

²⁷ *Id.* at § 54002.

ORDER

The appeal of claimant, Eric V., from the service agency's decision that he is not eligible for regional center services is denied.

DATED: April 11, 2006

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.